No. 708

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA, *Plaintiff in Error,* vs. C. C. MCCOY, DAVID W. SMALL, WILLIAM O'DONNELL and THOMAS MOSGROVE, *Defendants in Error.*	No. 708.

REPLY BRIEF FOR THE UNITED STATES.

Upon Writ of Error to the Circuit Court of the United States for the District of Washington, Southern Division.

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STATEMENT.

There is an error in the recital preceding the opinion of this Court regarding what the record shows, to which attention is called. It is stated therein (Record, page 28), "and on May 17th, 1893, said McCoy having failed to perform service on route No. 76,475, an order was made by the Second Assistant Post Master General declaring the said C. C. McCoy a failing contractor."

The order above referred to was not made by the Second Assistant Postmaster General, but by the Postmaster General. (Record, page 96.) The mistake probably arose from the letter of notification of the making of that order to C. C. McCoy by J. Lowry Bell, Second Assistant Postmaster General. (Record, page 94.) It is thought this mistake, if relied upon, might mislead, if the decision herein should turn upon the point made in the main brief of Plaintiff in Error (page 19 et seq.) That is, that the Postmaster General might annul the contract under its terms for repeated failures, etc. ; for though the Second Assistant Postmaster General might under statute perform duties imposed upon the Postmaster General by law, yet the power or discretion vested in him by the contract itself probably could not be delegated.

Regarding the opening sentence of the brief of Defendant in Error, attention is called to the fact that there is no reference made to any portion of the record supporting the statement therein,—that continuances had been repeatedly had of this cause in the Circuit Court at the instance of the Government, and there is nothing in the record to support such a statement.

ARGUMENT.

Regarding the error assigned of the Court's refusal to continue on the showing of Plaintiff in Error, it is stated in the brief of Defendant in Error as one of the reasons for refusing the continuance (page 2 thereof), "the learned trial Judge was familiar with the dilatory

course that had been pursued by the Government since these cases had been begun." There is nothing in the record to support that assertion. The reasons which the Court gave for the refusal to continue will be found on pages 51 and 52 of the Record, and the above quoted is not one of those given, and presumably, *expressio unius est exclusio alterius.*

It is submitted that the affidavit (Record, pages 48 to 50), discloses due diligence on the part of the Government to secure the wanting evidence. The Defendant in Error's criticism that though the case had been pending for years no effort had been made to take the deposition of Ford is unfair, for as the Record shows, the requirement of parol evidence of this character had only been disclosed by the opinion of this Court upon the former hearing. Up to that time the Government had no intimation but what its theory of the case that the Auditor's certified accounts were sufficient was sound. The Government had brought this case on for trial at the next term of the Circuit Court after that decision, that is, the next term at which it could practicably be brought on in view of the time allowed for filing a petition for re-hearing. (Record, page 51. Brief of Defendant in Error, page 2.)

The character of diligence required in such cases is reasonable diligence. There is no absolute standard. It depends upon the usual course of procedure and methods of doing business, and it is submitted that the learned Judge below erred in applying to the absent witness, a servant of the Government, with official knowledge, whom the Government itself had asked to

attend upon the Court to testify in its behalf, the same rules that might apply in the case of an ordinary witness. There is nothing to justify the inference or presumption that the witness had refused or would refuse to obey the command or request of the Government employing him in this particular. But even if the rules applying to an ordinary witness were to obtain, the excuse as offered for the absence of this witness was sufficient, and entitled Plaintiff in Error to a continuance. (4th Encyclopædia of Pleading and Practice, 861, and cases cited.)

RES ADJUDICATA.

If the argument of counsel for Defendant in Error on this point is to prevail, we are placed in this position : This Court having indicated in its opinion from what sources the testimony held to be wanting could be obtained, it was manifestly simpler and more satisfactory to secure the testimony of a witness to testify to the breach and default of McCoy than to petition for and argue a re-hearing, and the Government did all it could to comply with the order and opinion of this Court to remedy the adjudged defect upon the first trial. Without the fault of the Plaintiff in Error it was deprived of the benefit of that testimony, and also the further opportunity to secure it. Now we are told that these questions are settled past further consideration. The Circuit Court would not re-consider them for the manifest impropriety of ignoring and opposing the position taken by this, its superior tribunal, and a

review of the judgment of this Court by the Supreme Court, which judgment determines that the matter is res adjudicata, is doubtful. Therefore if this Court's announcement of the law applicable to this case has become fixed beyond consideration, and like the Median laws, the advisability of its change will not be debated, it seems that Plaintiff in Error, without its fault, has been deprived of valuable rights.

Aside from this argument of *harshness* and inconvenience, there is nothing in the doctrine of *res adjudicata* or law of the case to preclude the consideration of the sufficiency of this evidence. The reasons that led to the expressions contained in the former opinion of this case were no doubt weighty and well digested, and if not overcome on a reconsideration, would be all sufficient without resorting to an *ipse dixit.*

Upon the mandate this cause went back for a new trial, and it stood in the lower Court as any other case ready for trial. The pleadings might have been amended, or other testimony introduced. There was nothing final about it which might have been reviewed in an Appellate Court.

"When a case is reversed and remanded for further proceedings, generally a new trial should be had." (2nd Volume Pleading & Practice, 853 and cases cited.)

"A cause remanded without specific directions stands in the lower Court as if no trial had occurred or judgment had been rendered." (Volume II., Pleading &

Practice, 851, and cases cited. See also idem 858 and 860 and Vol. III. of Century Digest, page 2822, Section 4710 et seq.)

When other or similar questions and exceptions arise upon such new trial, there is nothing in reason or authority to justify a refusal to consider them. The cases cited by Defendant in Error, page 4 of his brief, in support of his position in this case, that the question of the sufficiency of the evidence offered is *res adjudicata*, are, so far as that contention is concerned, unhappily chosen, for in the first case cited, Thompson vs. Maxwell, etc., 168 U. S., 451, it was decided that in the first appeal certain matters were terminated and so expressed in the opinion and in the mandate, but the case was remanded and left open for amendment and additional proof on other points, and on the second appeal the Court properly refused to open up the whole case. It will be seen that this was much such a case as another one cited by the Defendant in Error, to-wit, Mathews vs. Columbia National Bank, 100 Federal, 393, which was a case decided by this Court, wherein it was on the first appeal decided that the plaintiff could not recover on his complaint, and the case was remanded for the purpose of trying the issues raised by the defendant's cross-complaint, and on the second appeal it was decided that the plaintiff could not go into the questions decided on the first appeal regarding the sufficiency of his cause of action outlined in the complaint. It will be seen that in both of these cases that certain issues had been determined, and the cause remanded for a trial on a portion of the issues not

determined, and were not cases like the one at bar, where a trial *de novo* on all issues was had.

In the next case relied upon by the Defendant in Error, the Great Western Telegraph Co. vs. Burnham, 162 U. S., 339, it is decided that an appeal does not lie to the Supreme Court of the United States from a judgment of an *inferior* state court.

The next case cited by Defendant in Error, Northern Pacific R. R. Co. vs. Ellis, 144 U. S., 458, merely decides that the decision of the highest court of a state that a former judgment of the same court in the same case was *res adjudicata*, in that case, as to the rights of the parties, involves no Federal question to give the Supreme Court of the United States jurisdiction.

The case cited by Defendant in Error, Supervisors vs. Kennicott, 94 U. S., 498, seems to me to recognize the distinction that eliminates the case at bar from the general rule which the cases cited by the Defendant in Error partly establish. That is, that the rule of *res adjudicata* to be successfully invoked on a second appeal must be based upon something determined and contained in the order and judgment made upon the first appeal, and that it does not apply or control in cases where it has been generally remanded to the lower Court for a new trial, for the Court again and again in ruling that the question was *res adjudicata* calls attention to the fact that the cause had not been remanded for a new trial or trial *de novo*, and therefore the matters discussed were the law of the case, plainly implying that if it had been remanded for a new trial such would not have been the case.

The next case cited by the Defendant in Error, Wright vs. Columbus, etc., 20 Supreme Court Reporter, 398, does not involve the question of *res ajudicata* at all, but that of *stare decisis.*

In the case of the City of Hastings vs. Foxworthy, a Nebraska case, reported in the 63rd Northwestern at 955, the Court reviews in extenso the cases generally relied upon by those invoking the rule of *res ajudicata* or law of the case to prevent the consideration of points alleged to have been terminated upon the first appeal or decision. The Court examines not only the Federal cases on this question, but those of California and other States, and after a careful review of such cases, justifiably concludes :

"The Supreme Court of the United States and other Courts having once entered judgments or decrees, finally ajudicating certain issues, decided very properly that on a second appeal nothing so adjudicated could be relitigated. Other courts decline to permit a party after an unsuccessful appeal to prosecute a second appeal from the same judgment. A few courts, notably California, failing to draw the distinction between a judgment upon the merits and a *venire de novo*, adopted these cases as authority for the proposition that, where a new trial had been awarded, the Court could not, on a second appeal, re-examine any questions of law decided on the first. Having gone so far, they were driven to the further conclusion that the principle applies to every question involved in the first appeal, whether in fact examined or not. Then in a few instances, after this doctrine had been established, but never in a case of first impression, some reasons have been given in its support. That usually given is that the first opinion is an adjudication. It needs but a moment's reflection to show that there is no adjudication by the expression of an opinion upon a point of law where no judgment is entered in accordance with that opinion, but the cause

is remanded generally. The only thing adjudicated is that there was error in the record, and that the whole case should be relitigated. To apply the rules of *res adjudicata* to such a case would require a further holding that, where a court has over-ruled a demurrer, it may not afterwards, on the trial dismiss the case, because no cause of action is stated ; or, having granted a temporary injunction, that it may not dissolve that injunction if it becomes satisfied that it was improvidently granted. * * * * * Why should the rule be more stringent when the same case is up for review, the erroneous judgment still unexecuted, the parties before the Court, and the case in such a situation that by the correction of its error no injustice will be done, beyond, perhaps, the creation of additional costs ? If the doctrine contended for is to prevail here, then it follows that the only instance in which the Court is not permitted to correct its mistakes, or refuse to do so, is also the only instance where the mistake can be corrected without injustice."

There are many other cases following the rule laid down in the above quoted case, which is the rule followed in those States opposed to the California doctrine.

So far as the motion or request of Defendant in Error that this Court dismiss the writ of error, on the ground that these matters were *res adjudicata*, is concerned, he has stated no authority to support it, and there is no such authority. In fact, one of the cases cited by him, to-wit, Great Western Telegraph Co. vs. Burnham, supra, decides point blank that such is not the proper practice, but that if the questions are *res adjudicata*, the judgment should be affirmed and the appeal should not be dismissed.

Aside from the abstract question of *res adjudicata* on second appeal and writs of error, as argued by Defendant in Error, that doctrine is not applicable to this suit. Where there has been a reversal and general remand as in the case at bar, and the question of *res adjudicata* is raised, all the cases show that where the mandate does not set forth the determination, invoked as the law of the case, and the Court looks beyond the mandate to the opinion to ascertain what has been decided, it will examine the reasons and arguments as there outlined to discover if on the former appeal all the matters presented in the later were presented, considered and disposed of in the first.

Now I submit that a perusal of the opinion of this Court on the former appeal (Record, pages 26 to 32 inclusive), discloses that the Court decided that the weak point in the chain of evidence offered by the Government was because the *statute* did not authorize the Postmaster General to make a certificate that the contractor had abandoned his contract, nor provide that such certificate should be admitted in evidence when made, and that neither the question of the sufficiency of the certified account of the Auditor as presented and argued in the main brief of Plaintiff in Error, pages 6 to 18 inclusive, nor the question of the sufficiency and effect of the certificate of the Postmaster General under the provisions of the contract as presented and argued in the main brief of Plaintiff in Error, pages 18 to 21 inclusive, were considered or passed on upon the former writ of error in this case.

Wherefore, it is respectfully submitted that the lower

Court erred, as more at large appears in the specifications of error herein, and that Plaintiff in Error is entitled to a consideration and review of those errors by this Court, and a reversal of the judgment of the Circuit Court.

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